95-1288

Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1995

ALL AMERICAN ASPHALT, DANIEL SISEMORE and MICHAEL RYAN,

*Petitioners,*

v.

JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO and GREGORY DENNIS,

*Respondents.*

**Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Two**

## PETITION FOR A WRIT OF CERTIORARI

LAWRENCE J. GARTNER
Counsel of Record
NAOMI YOUNG
CHRISTOPHER A. THORN
GARTNER & YOUNG
A Professional Corporation
1925 Century Park East,
Suite 2050
Los Angeles, CA 90067-2709
Telephone: (310) 556-3576

*Counsel for Petitioners*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

I. Whether a California state court can possess subject matter jurisdiction over employees' claims of retaliation for their group efforts in complaining of mine safety violations to the Federal Mine Safety and Health Administration in direct conflict with United States Supreme Court precedent, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*"), and California appellate law, *Rodriguez v. Yellow Cab Co-Op. Inc.*, 206 Cal. App. 3d 668, 253 Cal. Rptr. 779 (Cal. App. 1 Dist. 1988) ("*Rodriguez*"), which hold that such state common law claims are preempted by the National Labor Relations Act ("NLRA") and within the exclusive jurisdiction of the National Labor Relations Board ("NLRB").

II. Whether, in determining if the NLRA preempts a state common law claim for wrongful termination, a court must use the "concerted activity" test established by *Meyers Indus.* ("*Meyers I*"), 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984), or if the state appellate court could, contrary to NLRB and court decisions, require that no preemption would inure unless Respondents had first filed a charge with the NLRB, had union authority or support for their activity and were acting pursuant to contract.

## LIST OF PARENT COMPANIES AND SUBSIDIARIES

All American Asphalt has no parent company and has no subsidiary which is not wholly owned.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners All American Asphalt, Daniel Sisemore and Michael Ryan ("Petitioners") respectfully petition for a writ of certiorari to review the order of the California Court of Appeal, Fourth Appellate District, Division Two in this case.

## OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two (App. 2-3) and the Order of the California Supreme Court (App. 1) are each unreported.

## JURISDICTION

The Court of Appeal of California, Fourth Appellate District, Division Two filed its unpublished decision on September 27, 1995. (App. 2-3.) The California Supreme Court filed its unpublished denial of discretionary review of the California appellate decision on November 15, 1995. (App. 1.) The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257.

## STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA") guarantees that "[e]mployees shall have the right to . . . engage in . . . concerted activities." 29 U.S.C. § 157. Section 8 of the NLRA prohibits certain practices

by forbidding an "employer . . . to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in [Section 7]." 29 U.S.C. § 158.

## STATEMENT

Petitioners bring this petition for review of the denial of Petitioners' petition for a writ of mandate/prohibition by the California Court of Appeal, Fourth District, Division Two. (App. 2-3.) Petitioners herein had petitioned the California Court of Appeal for a writ directing the state trial court to vacate its order denying Petitioners' motion for summary judgment and directing the trial court to grant Petitioners' summary judgment in two consolidated actions.[1] Petitioners sought summary judgment on the grounds, *inter alia*, that, under applicable federal and state law, Respondents' wrongful termination and two other related state tort claims are preempted by the NLRA and within the exclusive jurisdiction of the National Labor Relations Board ("NLRB") because the employer conduct of which Respondents complained is arguably an unfair labor practice. Contrary to existing state and federal law, the California Court of Appeal below denied the petition.

[1] James Hyles ("Hyles"), Derrick Soto ("Soto"), Douglas Mears ("Mears"), and Gregory M. Dennis ("Dennis") will be referred to herein collectively as "Respondents."

### A. Respondents Complain On Behalf Of Others In Their Bargaining Unit That Petitioner All American's New Plant is Not Safe

Petitioner All American Asphalt, through its All American Aggregates unit, produces rock base aggregates for asphalt, concrete and filter materials. Through the undisputed facts submitted to the state trial court in support and opposition to Petitioners' motion for summary judgment, the parties agreed that after All American began to run its new processing plant, Respondent Hyles complained about the safety of the new plant to his union representative who then made a complaint to the federal Mine Safety and Health Administration ("MSHA"). In addition, Respondents Mears, Soto, Dennis, and Hyles spoke among themselves and with other employees about their concerns that safety devices were not in place at All American's new plant. After speaking with the other Respondents "about videotaping the plant to document the circumstances and conditions thereof", Respondent Hyles gave the videotape to MSHA. Fifteen months later All American Asphalt placed Respondents and several others on layoff. Respondents then filed grievances to contest their layoffs. The four individual Respondents also "went to the government together and each of the Respondents filed an MSHA complaint" claiming that they were discriminated against for voicing their safety concerns. Respondents were temporarily reinstated to employment pending a hearing before an administrative law judge. Respondents were later again placed on layoff with several others and again filed grievances to contest their layoffs.

## B. Proceedings Below

Respondents Hyles, Soto and Mears filed their lawsuit on July 2, 1993 for wrongful termination in violation of state public policy in the California Superior Court for the County of Riverside. Respondent Dennis filed a separate lawsuit in the same state court on July 7, 1993 for (1) wrongful discharge in violation of public policy, (2) intentional infliction of emotional distress, and (3) negligent infliction of emotional distress.

On September 3, 1993, Petitioners removed the Hyles Action to the United States District Court for the Central District of California based upon preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, *et seq.* On October 12, 1993, Petitioners removed the Dennis Action to the United States District Court for the Central District of California on the same grounds. On December 22, 1993, and October 7, 1994, the federal court respectively ordered the two actions remanded. On November 15, 1994, the California superior court consolidated the two actions for all purposes.

### 1. The Trial Court's Ruling On Petitioners' Motion For Summary Judgment

On May 16, 1995, Petitioners filed their motion for summary judgment or, in the alternative, summary adjudication of issues, on the grounds, *inter alia*, that Petitioners' claims were preempted by Sections 7 and 8 of the NLRA and within the exclusive jurisdiction of the NLRB. (App. 27-33.) The motion for summary judgment was heard on July, 1993 at which time the state trial court denied Petitioners' motion in its entirety. (App. 8-18.) The

trial court, *inter alia*, apparently made no ruling as to preemption by Sections 7 and 8 of the NLRA. *Id.* The trial court indicated, however, that it would sign Petitioners' proposed order denying summary judgment, which summarily states that Petitioners' cause of action for wrongful discharge in violation of public policy is not preempted by Sections 7 and 8 of the NLRA. (App. 4-7.) The trial court signed Petitioners' proposed order denying summary judgment on August 1, 1995. (App. 4-7.)

**2. The California Appellate Court's Denial Of Petitioners' Request For A Preemptory Writ Of Mandate/Prohibition**

On August 16, 1995, Petitioners filed their Petition for Writ of Mandate/Prohibition or Other Appropriate Relief, requesting the California Court of Appeal to issue a preemptory writ directing the trial court to vacate its order denying Petitioners' motion for summary judgment and directing the trial court to enter a new and different order granting summary judgment.

On September 27, 1995, the California Court of Appeal denied the Petition, setting forth a short statement of its reasons. With respect to preemption under Sections 7 and 8 of the NLRA, the California Court of Appeal opined that it was a "close" issue, stating as follows:

> The issue of preemption under the National Labor Relations Act §§ 7 and 8 is a close one. However, it is significant that real parties were exercising no contractual right and made no claim to the National Labor Relations Board concerning protected concerted actions. (*Cf.*

> *Platt v. Jack Cooper Transport Co., Inc.* (8th Cir. 1992) 959 F.2d 91.) Nor is it clear that they presented complaints as a joint effort or claimed union authority or support. (*Cf. Rodriguez v. Yellow Cab Co-Op., Inc.* (1980) 206 Cal. App. 3d 668.)

(App. 2-3.)

In denying the Petition, the California Court of Appeal failed to follow *Garmon* and *Rodriguez*, and applied the wrong legal test in determining whether Respondents' activities were "concerted activity."

## REASONS FOR GRANTING THE PETITION

If the orders of the state trial court and California Court of Appeal were permitted to stand, a California employer would face the nonsensical result that the NLRA would preempt a state law claim of retaliatory termination when the California employee complained to a *California* state agency, but not if the complaint was made to a *federal* agency. Not only is this particular decision of the California Court of Appeal nonsensical, but it serves as an example of state courts' increasingly bold attempts to disregard the purposes served through preemption of state common law claims by federal labor statutes in areas in which no true unique local concern exists.

### A. In Denying The Petition, The California Court Of Appeal Improperly Rendered A Decision Directly Contrary To United States Supreme Court Precedent And California State Cases Interpreting It

Where state causes of action challenge activities which are *arguably* unfair labor practices under Sections 7 or 8 of the NLRA, such causes of action are preempted because they are completely within the exclusive jurisdiction of the NLRB. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). As this Court stated in *Garmon*: "[w]hen an activity is *arguably* subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (Emphasis added.) *Id.* at 245.

Section 7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection. Section 8 prohibits employer interference with or restraint or coercion of employees in the exercise of their Section 7 rights. The "mutual aid or protection" clause includes protecting "employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums. . . . " *Eastex v. N.L.R.B.*, 437 U.S. 556, 565-66 (1978). "[O]ne recognized area of protected activity under Section 7 is employee complaints to government agencies." *Squier Distrib. Co. v. Local 7, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 801 F.2d 238, 241 (6th Cir. 1986). The NLRB has

expressly held[2] that expressions of concern regarding safety are encompassed within the protections of Sections 7 and 8 of the NLRA. *Martin Marietta Corp.*, 293 N.L.R.B. 719, 131 L.R.R.M. 1714 (1989). *Accord Platt v. Jack Cooper Transport, Co., Inc.*, 959 F.2d 91, 95 (8th Cir. 1992).

The facts in the present case are nearly identical to those in *Rodriguez*, wherein another California court of appeal panel applied *Garmon* in holding that a state law wrongful termination claim is preempted by the NLRA and within the exclusive jurisdiction of the NLRB. *Rodriguez v. Yellow Cab Co-Op., Inc.*, 206 Cal. App. 3d 668, 253 Cal. Rptr. 779 ("Rodriguez"). In *Rodriguez*, the plaintiff claimed, as do Respondents herein, that he had been wrongfully terminated in violation of public policy. *Rodriguez*, 206 Cal. App. 3d at 671-72, 253 Cal. Rptr. at 780. The *Rodriguez* plaintiff, who was a cab driver, helped found a labor organization and, among other things, testified on behalf of this union before the California Public Utilities Commission ("PUC") in opposition to the

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[2] This Court has indicated that the NLRB is entitled to a great degree of deference involving interpretations of the Act. In *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 500 (1978), this Court stressed that such judicial review must be "limited," for "[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. . . . [Effectuating] national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [NLRB], subject to limited judicial review." This Court reaffirmed this approach most recently in *N.L.R.B. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990), saying that it would uphold the Board's construction of the Act when it is "rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board."

employer's application for airport van permits, which he claimed was against the interests of cab drivers.

After his termination, the *Rodriguez* plaintiff/employee filed a state court action alleging, *inter alia*, wrongful termination in retaliation for his testimony before the PUC. Applying the *Garmon* doctrine, the California court of appeal held in *Rodriguez* that the employee's testimony before the PUC was both concerted activity and for the purposes of the mutual aid and protection of plaintiff and his co-workers: "The Supreme Court [in *Eastex, Inc. v. N.L.R.B.*] pointed out that the ' "mutual aid or protection" clause protects employees from retaliation when they seek to improve working conditions through resort to administrative and judicial forums. . . . ' " *Id.* at 675, 253 Cal. Rptr. at 782. The court of appeal in *Rodriguez* thus upheld summary judgment in favor of the employer on the grounds that the employee's claims, including his action for wrongful termination in violation of public policy, were *entirely* preempted by the NLRA. *Id.* at 681, 253 Cal. Rptr. at 786.

The undisputed facts herein, which were all admitted by Respondents below, establish that any alleged retaliatory layoff of Respondents arose from concerted activity protected under Sections 7 and 8 of the NLRA. Indeed, as in *Rodriguez*, Respondents' activities were both concerted *and* for the mutual aid and protection of Respondents and their co-workers. Not only has Respondent Hyles stated that he was concerned for the safety of other employees when All American's plant was started up, but all of the Respondents discussed among themselves and with other employees that the plant was starting up without all the

safety devices in place. Respondent Hyles also complained to his union representative that All American was allegedly starting up its plant without all the required safety equipment installed. Respondents dicussed and agreed that All American should be turned in because of the alleged safety violations, and they discussed that Hyles would go file a complaint with MSHA. After their initial layoff, Respondents then discussed among themselves filing discrimination complaints with MSHA challenging their layoff, and all of the Respondents then went to MSHA together to file retaliation complaints. Obviously recognizing their layoffs revolved around the union contract, Respondents filed grievances regarding these layoffs pursuant to the collective bargaining agreement.

Other than the fact that the *Rodriguez* plaintiff was concerned with the effect of van permits on driver job security and other working conditions and in this case Respondents were concerned with safety conditions, there is no significant difference between the undisputed facts herein and those in *Rodriguez*. Here, as in *Rodriguez*, the same issue would be before the NLRB as before the state court: *i.e.*, were Respondents laid off or subjected to adverse treatment for voicing their concerns or complaints about unsafe working conditions? The California court of appeal's reasoning in *Rodriguez* is equally applicable here: to permit Respondents' state causes of action to proceed would pose too great a risk of interfering with the federal regulatory scheme and thus would override any local or state interest in permitting such a cause of action to proceed. *Id.* at 678-79, 253 Cal. Rptr. at 784, 785.

By completely ignoring not only applicable United States Supreme Court precedent but also a California

court of appeal decision almost directly on point, the California Court of Appeal in this case acted contrary to existing state and federal law by denying Petitioners' petition for a writ. Accordingly, this petition should be granted to secure uniformity of state and federal case law regarding NLRA preemption and to settle this important issue of law relating to state court subject matter jurisdiction.

### B. The California Court Of Appeal Applied The Wrong Legal Test In Determining Whether Respondents Engaged in Activity Which is Arguably Protected Concerted Activity

The California Court of Appeal herein erroneously ruled, without any support and contrary to existing authority, that there was no NLRA preemption of Respondents' state law claims. Citing *Platt v. Jack Cooper Transport, Co., Inc.* ("*Platt*"), the Court stated that "it is significant that [Respondents] were exercising no contractual right and made no claim to the [NLRB] concerning protected concerted actions." (App. 2.) Citing *Rodriguez*, the Court further stated that "[n]or is it clear that [Respondents] presented complaints as a joint effort or claimed union authority or support." (App. 3.) In so reasoning, the California Court of Appeal misconstrues *Platt* and *Rodriguez* and applies the wrong test in determining whether "arguably protected" "concerted action" took place.

Contrary to the test used by the California Court of Appeal below, an employee simply has to engage in activity with or on the authority of other employees as

opposed to solely by and on behalf of the employee himself to engage in concerted action within the meaning of the NLRA. *Meyers Indus.* ("*Meyers II*"), 281 N.L.R.B. 882, 123 L.R.R.M. 1137 (1986), *aff'd, Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied, Meyers Indus., Inc. v. N.L.R.B.*, 487 U.S. 1205 (1988). *See also N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F.3d 261 (9th Cir. 1995) (to be engaged in concerted activity "an employee must act with or on the behalf of other employees".) Concerted activity may be established by an employee's discussion of safety issues with other employees before the employee's alleged retaliatory discharge, *Meyers II*, 281 N.L.R.B. at 885, by an employee's notification to fellow employees that he intends to seek improvements in working conditions, *Meyers II*, 281 N.L.R.B. at 886, n.34, or by an employee refraining from making his own complaint, relying upon another employee to resolve the dispute. *Meyers II*, 281 N.L.R.B. at 886-887.

*Garmon* holds that state court actions challenging activities which are "arguably" unfair labor practices are preempted by the NLRA. Neither the *Garmon* nor the *Meyers* lines of cases require that a grievance be submitted to the NLRB in order to find concerted activity or preemption. Indeed, inherent in *Garmon*'s "arguably protected" standard is the reality that a grievance does not have to be resolved by the NLRB before the subject activity is considered protected by the NLRA. *Platt*, cited by the California Court of Appeal below, does not support the state court's ruling. Although there was an NLRB grievance similar to the employee's state law claim filed in *Platt*, at *no* time did the *Platt* court express or even

remotely imply that concerted activity (and, consequently, related *Garmon* preemption), could only occur where there is an NLRB grievance filed. *Accord Rodriguez*, 206 Cal. App. 3d 668, 674, 253 Cal. Rptr. 779, 781 (1988) ("Even if the NLRB declines to act, a state court may not assert jurisdiction over an unfair labor practice.")

The California Court of Appeal below also misinterpreted *Rodriguez* and *Platt* in finding that Respondents were not engaging in protected concerted activity because they were not exercising any contractual right or claiming union authority or support for their activity. Both the NLRB and courts have found concerted action where there was no issue involving a contract right or union support. *See Salisbury Hotel*, 283 N.L.R.B. 685, 686, 125 L.R.R.M. 1020, 1021 (1987) (employee who complained to other employees about a change in the employer's lunch hour policy and had thereafter contacted the U.S. Department of Labor regarding the change engaged in concerted activity); *Every Woman's Place v. N.L.R.B.*, 282 N.L.R.B. 413, 124 L.R.R.M. 1001 (1986), *enforcement granted, Every Woman's Place, Inc. v. N.L.R.B.*, 833 F.2d 1012 (6th Cir. 1987) (telephone call to Department of Labor was sufficiently linked to group activity to constitute protected activity); *T & W Fashions*, 291 N.L.R.B. 137, 142, 131 L.R.R.M. 1293, 1294 (1988) (attendance of employees at a meeting with representatives of the Department of Labor to obtain information in support of a civil action for failure to pay minimum and overtime wages constituted concerted activity protected by Section 7 of the NLRA). *See also Squier Distrib. Co. v. Local 7, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and*

*Helpers of America*, 801 F.2d 238, 242 (6th Cir. 1986) (holding that four employees who gave statements to a sheriff regarding embezzlement of company funds were unlawfully discharged for protected activities).

Under the *Meyers II* test set forth by the NLRB, as well as the authorities defining protected concerted activity as set forth above, Respondents' actions were unquestionably protected concerted activity under the NLRA. Any actions then allegedly taken by Petitioners to retaliate for such protected concerted activity are, therefore, arguably an unfair labor practice exclusively within the jurisdiction of the NLRB.

### C. The Resolution Of These Issues Now Is Important To Protect The Balance Of Power Between Labor And Management Which Congress Has Sought To Protect

As in other cases this Court has noted that it is appropriate for this Court to review the federal question before the state court now rather than require the litigants and state courts to first go through the completion of trial. For example, this Court in *Belknap, Inc. v. Hale*, 483 U.S. 491 (1983), considered the issue whether the NLRA preempts a misrepresentation and breach of contract action against an employer brought in state court by strike replacements purportedly assured by management that they would not be fired. In *Belknap*, the employer was granted summary judgment on NLRA preemption in the state trial court, the state court of appeal reversed, and the state supreme court initially granted review and then later vacated its order stating that review was

improvidently granted. While the parties faced the possibility of a trial in the state trial court, the United States Supreme Court granted the petition for certiorari. This Court has explained the propriety of granting a petition at this stage:

> The judgment of the Kentucky Court of Appeals is final within the meaning of 28 U.S.C. § 1257: it finally disposed of the federal pre-emption issue; a reversal here would terminate the state court action; and to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of " 'requiring the subject matter of respondents' cause to be heard by the . . . Board, not the state courts.' " *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483, 95 S. Ct. 1029, 1040, 43 L.Ed. 2d 328 (1975), quoting *Construction Laborers v. Curry*, 371 U.S. 542, 550, 83 S. Ct. 531, 536, 9 L.Ed. 2d 514 (1963). Or as Justice REHNQUIST put it, our jurisdiction in *Curry* rested on the "understandable principle that where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation." *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S., at 506, 95 S. Ct., at 1051 (dissenting opinion).

*Id.* at 497 n.5; *see also Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___, 114 S.Ct. 2239 (1994) (granting petition for certiorari while state action was pending trial in state court after state supreme court reversed dismissal of

action by state trial court on grounds of federal preemption).

Not only would immediate rather than delayed review be the best way to avoid "the mischief of economic waste and of delayed justice" eschewed by this Court, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), it can serve as guidance to the ever-increasing disregard of the importance of the exclusive jurisdiction of the NLRB. In finding that Respondents were not engaging in protected concerted activity because they did not file a claim with the NLRB or were not exercising any contractual right or claiming union authority or support for their activity, the California Court of Appeal essentially eviscerates the scope of the exclusive jurisdiction of the NLRB. If these factors are determinative – or even relevant – in determining whether a state court action is preempted by the NLRA, then a disgruntled employee/plaintiff may avoid the exclusive jurisdiction of the NLRB solely by refusing to participate in the collective bargaining grievance procedures and/or by simply ignoring the remedial process of the NLRB. A disgruntled union employee need only assert that he or she is not exercising a contractual right, and instead a state granted right, to avoid federal preemption. Giving a disgruntled employee the choice to opt out of the collective bargaining process scheme or the regulatory scheme of the NLRA can only upset the balance of power between labor and management which Congress has sought to protect. As this Court has previously noted, the very fact that a state court remedy may differ from that which the NLRB can impose in adjudicating the dispute is a reason *supporting* a finding of NLRA preemption to avoid upsetting the balance

of power between management and labor that the federal labor statutory scheme has established. *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 286-87, 288 n.5 (1986).

Inasmuch as the persuasive authority of the NLRB, the more recent federal court decisions and the authority of the California courts specifically addressing the issue support the fact that Respondents' cause of action for termination in violation of public policy based on Respondents' claims of retaliation for voicing safety complaints is barred by the preemptive scope of the NLRA by the principles enunciated in *Garmon*, this Court should find that the state trial court below erred in denying Petitioners' motion for summary judgment; that the California Court of Appeal erred in affirming that order and that the exclusive jurisdiction to adjudicate Respondents' state court action rests with the NLRB.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Date: February 13, 1996

Respectfully submitted,

LAWRENCE J. GARTNER
Counsel of Record
NAOMI YOUNG
CHRISTOPHER A. THORN
GARTNER & YOUNG
A Professional Corporation

*Attorneys for Petitioners*
*All American Asphalt, Daniel Sisemore and Michael Ryan*

Fourth Appellate District, Division Two, No. E016782
S049338

IN THE SUPREME COURT OF CALIFORNIA

(Filed Nov. 15, 1995)

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ALL AMERICAN ASPHALT, Petitioner

v.

RIVERSIDE COUNTY SUPERIOR COURT, Respondent

JAMES HYLES Et Al., Real Parties In Interest

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Petition for review DENIED.

/s/ Lucas
Chief Justice

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

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| ALL AMERICAN ASPHALT et al., Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent. JAMES HYLES et al., Real Parties in Interest. | E016782<br>COUNTY NO. 236616<br>236751<br>(Filed Sep. 27, 1995) |

THE COURT:

The petition is DENIED. The claim of preemption under the Labor and Management Act § 301 is not well founded, as the fact that petitioner's actions might have been proper under the collective bargaining agreement is not relevant to a state law claim. (*Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399; *O'Shea v. Detroit News, Inc.* (6th Cir. 1989) 887 F.2d 685; see also *Balog v. LRJV, Inc.* (1988) 204 Cal.App.3d 1295.)

The issue of preemption under the National Labor Relations Act §§ 7 and 8 is a close one. However, it is significant that real parties were exercising no contractual right and made no claim to the National Labor Relations Board concerning protected concerted actions. (*Cf. Platt v.*

*Jack Cooper Transport Co., Inc.* (8th Cir. 1992) 959 F.2d 91.) Nor is it clear that they presented complaints as a joint effort or claimed union authority or support. (*Cf. Rodriguez v. Yellow Cab Co-op., Inc.* (1980) 206 Cal.App. 3d 668.)

RICHLI
Acting P.J.

cc:
Superior Court Clerk, Riverside County, P.O. Box 431, Riverside, CA 92502

Gartner & Young
Lawrence J. Gartner
1925 Century Park East, Suite 2050
Los Angeles, CA 90067-2709

Rehwald, Rameson, Lewis & Glasner
Chaleff, Daniel
5855 Topanga Canyon Blvd., Ste. 400
Woodland Hills, CA 91367-4600

WILLIAM REHWALD, SB#51396
LAWRENCE MATTHEW GLASNER, SB#142677
DANIEL CHALEFF, SB#173028
REHWALD RAMESON LEWIS & GLASNER
5855 Topanga Canyon Blvd., Suite 400
Woodland Hills, California 91367-4600

818/703-7500

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

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| JAMES HYLES, DERRICK SOTO, and DOUGLAS MEARS,<br><br>Plaintiffs,<br><br>vs.<br><br>ALL AMERICAN ASPHALT, a corporation, DANIEL SISEMORE, an individual, MICHAEL RYAN, an individual, and DOES I through XX, inclusive,<br><br>Defendants.<br><br>AND CONSOLIDATED ACTION. | CASE NO. 236616<br><br>[PROPOSED] ORDER DENYING SUMMARY JUDGMENT<br><br>DATE: July 13, 1995<br>TIME: 8:30 a.m.<br>DEPT.: 5<br><br>Trial Date:<br>February 12, 1996<br><br>Discovery Cut-off:<br>January 12, 1996<br><br>Motion Cut-off:<br>January 12, 1996<br><br>(Filed Aug. 1, 1995) |

The Motion of Defendants All American Asphalt, et al., for Summary Judgment came on regularly for hearing before this Court in Department No. 5, Hon. Dennis C.

McConaghy, Judge presiding, and Mark Goldsmith and/or Lawrence Gartner appeared as attorneys for Defendants All American Asphalt, et al. and William Rehwald appeared as attorney for Plaintiffs James Hyles, Derrick Soto, Douglas Mears and Gregory Dennis.

After full consideration of the evidence and points and authorities and Separate Statement submitted by both parties, and oral arguments of counsel, it appears and the Court finds that there is a triable issue as to the following material facts raised by said motion, and as shown by the following evidence:

| MATERIAL FACTS AS TO WHICH TRIABLE ISSUES EXIST | REFERENCES TO EVIDENCE INDICATING CONTROVERSY |
|---|---|
| 1. Employer had knowledge that Plaintiffs engaged in protected activity. | 1. Hyles declaration at ¶¶ 17, 18. Mears declaration at ¶ 6. Soto declaration at ¶ 8. Dennis declaration at ¶ 8. |
| 2. Mears, Soto, and Dennis complained to their immediate supervisor, Mr. Hyles, about safety concerns prior to first layoff, Hyles in turn then went to MSHA. | 2. Hyles declaration at ¶ 9. Soto declaration at ¶ 4. Mears declaration at ¶ 4. Dennis declaration at ¶ 4. |

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| 3. Hyles, Mears, Soto, and Dennis after being interviewed by MSHA, suffered adverse employment actions by defendants. | 3. Hyles declaration at ¶¶ 20, 21, 24, 25, 28, 30, 34, 35. Soto declaration at ¶¶ 9, 10, 11, 12, 14, 15. Mears declaration at ¶¶ 7, 8, 9, 10, 11. Dennis declaration at ¶¶ 9, 10, 11, 13, 14. |
| 4. The second layoff, in March of 1993, was unusual, and an attempt to retaliate against plaintiffs for their protected activity. | 4. McGuire declaration at ¶¶ 4, 6. Hyles declaration at ¶ 28. Soto declaration at ¶ 12. Mears declaration at ¶ 9. Dennis declaration at ¶ 11. |

The First Cause of Action in the First Amended Complaint of James Hyles, Derrick Soto, and Douglas Mears and the Complaint of Gregory M. Dennis for wrongful discharge in violation of public policy is with substantial merit. The supporting evidence is the Declarations of James Hyles, Derrick Soto, Douglas Mears, Gregory M. Dennis, Patrick McGuire, Jerald Drussel, and Mark Ogden, and the transcript of the proceedings in the matter in Federal Mine Safety and Health Review Commission. Plaintiffs have provided substantial evidence to create a triable issue of fact in this cause of action.

The Court finds that the First Cause of Action for wrongful discharge in violation of public policy is not preempted by Section 301 of the federal Labor Management Relations Act, is not preempted by Sections 7 and 8 of the Federal National Labor Relations Act and is not preempted by the Federal Mine Safety and Health Act.

The Court also finds that Plaintiffs' Cause of Action has substantial merit because there is evidence that Plaintiffs Derrick Soto, Douglas Mears, and Gregory M. Dennis made a safety complaint, and that Defendants knew about the safety complaint made by Plaintiffs prior to their being laid off in July 1992.

The Second Cause of Action in the Dennis Complaint for intentional infliction of emotional distress has substantial merit and is not preempted by the California Workers' Compensation Act and Plaintiff has stated sufficient facts in support of a claim for intentional infliction of emotional distress. The supporting evidence is the declarations of Greg Dennis, Jerald Drussel and Mark Ogden.

The Third Cause of Action in the Dennis Complaint for negligent infliction of emotional distress has substantial merit and is not preempted by the California Workers' Compensation Act.

Finally, Defendant Ryan is not dismissed pursuant to the managerial privilege.

IT IS THEREFORE ORDERED that the said motion for summary judgment be, and it hereby is, in all respects, DENIED.

Dated: 8-1-95

**DENNIS A. McCONAGHY**
JUDGE OF THE
SUPERIOR COURT

THE CONSOLIDATED SUPERIOR/MUNICIPAL
COURTS OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

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| JAMES HYLES, et al., Plaintiffs, -vs- ALL AMERICAN ASPHALT, et al., Defendants. | ) | **CASE NO.** 236616 |

**REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS**

Oral proceedings had before the Honorable Dennis A. McConaghy, Judge of the Consolidated Superior/Municipal Courts in and for the County of Riverside, Department 5, **July 13, 1995.**

APPEARANCES:

For the Plaintiffs:

REHWALD RAMESON LEWIS & GLASNER
ATTORNEYS AT LAW
BY: WILLIAM REHWALD and
DANIEL CHALEFF
5855 Topanga Canyon Blvd., Suite 400
Woodland Hills, California 91367-4600

For the Defendant:

GARTNER & YOUNG
ATTORNEYS AT LAW
BY: LAWRENCE J. GARTNER
1925 Century Park East, Suite 2050
Los Angeles, California 90067-2709

REPORTED BY:
DEBRA J. BELLANCA, CSR NO. 5333
OFFICIAL REPORTER
RIVERSIDE SUPERIOR COURT

[p. 1] RIVERSIDE, CALIFORNIA; JULY 13, 1995

THE COURT: Hyles versus All American.

MR. GARTNER: Good morning, your Honor. Lawrence Gartner, Gartner and Young, representing defendants and moving parties.

MR. REHWALD: Good morning, your Honor. William Rehwald of Rehwald Rameson Lewis & Glasner representing the defendants – excuse me, plaintiffs, opposing party.

MR. CHALEFF: Daniel Chaleff also on behalf of the plaintiffs.

THE COURT: The Court intends to deny the motion on the grounds that triable issues of material fact do exist regarding the wrongful termination claims. And the claims are not preempted by the Labor Management Relation Act, Section 301 or the Federal Mine Safety and Health Act as a matter of law.

The Court further finds that the emotional distress claims are not barred by the exclusivity provisions of the Workers' Compensation Act as a matter of law.

MR. GARTNER: May I address a couple points, your Honor?

THE COURT: Sure, if it's not already in writing, sir.

MR. GARTNER: Well, the Court indicated – may have heard the Court incorrectly – that it wasn't preempted by Section 301, Labor Management Relation Act.

THE COURT: Yes, sir.

[p. 2] MR. GARTNER: There was alternative preemption argument that was advanced by the defendants, and that is preemption under Section 7 and 8 of the National Labor Relation Act, which is a separate and distinct preemption under a separate and distinct portion of federal labor law.

I don't believe that the preemption under the National Labor Relations Act was ever opposed in anyway by the plaintiffs in this case. Plaintiffs' sole opposition was on the grounds that the Federal Court remanded or was res judicata on the issue of Section 301 preemption.

I think I also argued it was res judicata on our preemption, but review of the Federal Court's remand order indicates the Federal Court did not address NLRA preemption, nor could it because, in fact, the Federal Courts do not have jurisdiction over arguably protected concerted activities. So I'm not certain of the – that the Court is also ruling that NLRA preemption does not apply.

THE COURT: Say the last.

MR. GARTNER: I'm not sure that the Court is also ruling that the preemption under the National Labor Relation Act does not apply.

THE COURT: I did not say that. Wish to respond?

MR. REHWALD: Your Honor, we opposed – opposed all preemption grounds that were raised by the defendants' motion for summary judgment. And we do not believe that they are preempted because these are state law claims, state law causes of actions, which have their basis under the *Tameny* [p. 3] case, the *Foley* case, the *Rojo* case, Labor Code Section 1105, Labor Code Section 6312.

And further on the case of – the *Jenkins* case, all of which we have cited, that these are all state court claims, which are – none of them are preempted or find any of their basis, either in NLRA, the National Labor Relation Act, or any of them. None are – they are preempted. These are state claims which this Court has jurisdiction over.

MR. GARTNER: Your Honor, I would refer the Court to the case of *Rodriguez versus Yellow Cab,* which is a California Court of Appeal case. It was cited in our moving papers. In *Rodriguez,* the Court – the case is virtually on point by the California Court of Appeal on the issue of NLRA preemption not 301 preemption.

And in *Rodriguez,* the plaintiff was claiming that the state court, as do the plaintiffs here, that they were terminated in violation of public policy; namely, that they were – that the plaintiff in *Rodriguez* claimed he was terminated because he testified before the public utilities of California opposing airport ban permits for Yellow Cab Company because that was against the interests of their drivers.

As in this case, if defendant Yellow Cab did assert NLRA preemption on the grounds that that was a protected activity and concerted under the mutual items protection clause of the National Labor Relations Act separate and apart from Section 301.

In fact, the California Court of Appeal in *Rodriguez* said complaints to the Coast Guard, to the State [p. 4] Health Department, and to the Federal Occupational Safety and Health Administration were all concerted activity.

The California Court of Appeal in *Rodriguez* held that all – that the plaintiff's claim of wrongful termination because he testified before the public utilities was completely preempted by the National Labor Relations Act action, and that the state court had no further jurisdiction to act.

And what I am suggesting, your Honor, is I understand your Honor has ruled on the Section 301 preemption which deals with contract matters. But it's not clear to me that the Court has ruled on the NLRA preemption issue. And I think upon review of the *Rodriguez versus Yellow Cab,* the similarities between this case and that case are striking. And I think virtually require this Court to grant the summary judgment motion based upon the undisputed facts in this case that there was concerted activity to protect safety violations that is within the exclusive jurisdiction of the National Labor Relations Board.

THE COURT: One last time. Anything to add?

MR. REHWALD: Protesting – protesting unsafe working conditions is a California Labor Code Section issue 6312, and there is a private cause of action for that. The *Hensell* case and the *Jenkins versus Family Health Program* case that we cited in our opposition papers.

THE COURT: Court's going to stand by its intended ruling.

MR. GARTNER: Your Honor, may I make a couple of [p. 5] requests of your Honor?

THE COURT: Sure.

MR. GARTNER: First, Your Honor, may we request an additional 10 day under 437(l), I believe, to file a petition for writ of mandate? The Court has discretion to grant up to an additional 10 days for the party.

THE COURT: Let me take a look at (l). That is a section that I don't deal with on a regular basis.

MR. REHWALD: May I look over counsel's shoulder?

THE COURT: You may. I'm glad somebody else isn't totally familiar with it.

MR. GARTNER: It's right at the end of the paragraph, your Honor.

THE COURT: I seldom get beyond (h). According to (h), you have 20 days after service to file your notice of –

MR. GARTNER: That's correct. The last sentence indicates, your Honor, the superior court may, for good cause, and prior to the expiration of the initial

period, extend the time for one additional period not to exceed 10 days.

THE COURT: So you're telling me that you need 30 days instead of the 20?

MR. GARTNER: We'd request that of the Court, your Honor.

MR. REHWALD: Well, your Honor, I haven't seen good cause, but I'm in spirit of cooperation. I'm not – I'm not going to seriously oppose it, if your honor wishes to [p. 6] grant it.

THE COURT: I don't have wishes in life. If you don't oppose it, I'll grant it.

MR. GARTNER: We would also request, your Honor, that –

THE COURT: You might be pushing your luck now, but go ahead.

MR. GARTNER: Never hurts to ask, your Honor. We would request a stay of the proceedings in the case until – we do intend to file a petition to the Court of Appeal for a writ, stay of the proceedings, pending the decision of the Court of Appeal. We think that –

THE COURT: In essence, you're asking to stay the discovery during that period of time?

MR. GARTNER: That is correct, your Honor.

MR. REHWALD: Your Honor, I have a problem with that only because we've got a trial date of February 12th, and, you know, there's – time is – time is ticking. And there is discovery we wanted to do. In fact, we had

four depositions today that were scheduled, which counsel wouldn't – well, counsel said they wouldn't go forward with those depositions until after today. And they haven't given us a new date for that discovery. It's important discovery for us.

I don't know how long the Court of Appeals proceeding is going to take, but there is a lot of work that needs to be done.

THE COURT: Generally doesn't take very long for [p. 7] writs.

MR. REHWALD: I still think, your Honor, we should be able to go through with discovery. I don't –

THE COURT: Do you have anything calendered between now and the 30 days from now?

MR. REHWALD: We had four depositions calendered.

THE COURT: Other than those four?

MR. REHWALD: I do not believe we had anything calendered.

THE COURT: I'm not going to stay the discovery, but I don't think you're going to be able to get anything calendered in the next week or two anyway. And I think the writ, if it's filed, will be either granted or denied quickly. They don't take a lot of time. So I'm going to deny that request.

MR. GARTNER: One last inquiry, your Honor.

THE COURT: Okay.

MR. GARTNER: First, your Honor's rulings on the labor law preemption issues, are those based upon interpretation of fact, or does your Honor find disputed issues of fact on the issue of labor – these labor law preemptions?

THE COURT: I'm sorry. Your question one more time.

MR. GARTNER: My question is: Is that a ruling on – by your Honor on the issue of law in terms of the NLRA and Section 301 labor law preemption, or is your Honor finding [p. 8] any disputed issues of fact regarding those preemption defenses?

THE COURT: On the law issue, as per the case that counsel just stated, the Court believes that it's a state court issue, and that's the reason for the labor law.

MR. GARTNER: And, your Honor, one last thing. Has the Court made any rulings on defendants' evidentiary objections?

THE COURT: Refresh my memory.

MR. REHWALD: There were 128 separate objections to our evidence that was filed by plaintiffs in reply.

MR. GARTNER: I'm not necessarily asking the Court to rule on all of the evidentiary objections, of course, but it's not clear to me exactly what the disputed issues are. And, if, in fact, they're based upon evidence that was objected to, I think we ought to have, for the record, the basis of the ruling on the objections.

THE COURT: You keep letting your voice trail off. I can't hear you.

MR. GARTNER: I'm sorry, your Honor. It's not clear to me what exactly the disputed issues are that led the Court to deny the motion for summary judgment. So only as to those disputed issues, of course, would the evidentiary objections be significant.

THE COURT: Have you seen the proposed order denying the summary judgment which lists the issues?

MR. REHWALD: The one that was filed by us should have been served on you, counsel.

[p. 9] MR. GARTNER: We may – well, I have not seen it, your Honor. I apologize.

THE COURT: Because that lists the disputed issues --

MR. REHWALD: Yes, your Honor.

THE COURT: – I believe.

MR. REHWALD: Are you signing that order today? Is that correct?

THE COURT: Yes.

MR. REHWALD: Thank you very much, your Honor.

MR. GARTNER: Thank you, your Honor.

THE COURT: Thank you, folks.

(Proceedings concluded at this time.)

**CERTIFICATE**

State of California )
County of Riverside)

I, DEBRA J. BELLANCA, C.S.R., Official Reporter, of the State of California for the County of Riverside, do hereby certify that the foregoing pages numbered 1 through 9 inclusive, comprise a true and correct transcript of the proceedings held in the above-entitled matter on July 13, 1995.

Dates this 20th day of July, 1995.

/s/ Debra J. Bellanca
DEBRA J. BELLANCA,
CSR NO. 5333

NAOMI YOUNG, ESQ. (63468)
LAWRENCE J. GARTNER, ESQ. (47872)
MARK E. GOLDSMITH, ESQ. (127701)
GARTNER & YOUNG
A Professional Corporation
1925 Century Park East, Suite 2050
Los Angeles, California 90067-2709
Telephone: (310) 556-3576

Attorneys for Defendants
ALL AMERICAN ASPHALT, DANIEL SISEMORE
and MICHAEL RYAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

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| JAMES HYLES, DERRICK SOTO, and DOUGLAS MEARS,<br><br>Plaintiffs,<br><br>vs.<br><br>ALL AMERICAN ASPHALT, a corporation; DANIEL SISEMORE, an individual; MICHAEL RYAN, an individual, and DOES I through XX, inclusive,<br><br>Defendants. | CASE NO. 236 616<br><br>[Assigned for all purposes to Dept. 5, the Honorable Dennis C. McCohaghy [sic]]<br><br>NOTICE OF MOTION AND MOTION OF DEFENDANTS ALL AMERICAN ASPHALT, DANIEL SISEMORE, AND MICHAEL RYAN FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES<br><br>Date: June 20 95<br>Time: 8:30 a.m.<br>Dept.: 5<br><br>Trial: February 13, 1996<br>Discovery Cutoff: January 12, 1996<br>Motion Cutoff: January 12, 1996<br><br>(Filed May 16, 1995) |

TO PLAINTIFFS JAMES HYLES, DERRICK SOTO, DOUGLAS MEARS, AND GREGORY DENNIS:

PLEASE TAKE NOTICE that on June 20, 1995 at 8:30 a.m., in Department 5 of the above-entitled court, located at 3547 10th Street, Riverside, California, Defendants All American Asphalt, Daniel Sisemore, and Michael Ryan ("Defendants") will, and hereby do, move this Court pursuant to Section 437c of the California Code of Civil Procedure, for summary judgment against Plaintiffs James Hyles, Derrick Soto, Douglas Mears, and Gregory Dennis ("Plaintiffs") on the first amended complaint of Plaintiffs James Hyles, Derrick Soto, and Douglas Mears, dated July 28, 1993 ("Hyles Complaint") and the complaint of Gregory M. Dennis, dated July 7, 1993 ("Dennis Complaint"). This motion is made on the grounds that the Hyles Complaint and the Dennis Complaint, and each cause of action contained therein, have no merit and that based on the undisputed facts, Defendants are entitled to summary judgment as a matter of law on the entire Hyles Complaint and the entire Dennis Complaint. The Dennis action has been consolidated with the Hyles action. In the alternative, Defendants will move for summary adjudication of the following issues:

1. The first cause of action in the Hyles Complaint and the first cause of action in the Dennis Complaint for wrongful discharge in violation of public policy has no merit. (*See* Separate Statement of Undisputed Facts of Defendants All American Asphalt, Daniel Sisemore and Michael Ryan in Support of Their Motion for Summary Judgment or, in the Alternative, Summary Adjudication of the Issues, ("Undisputed Facts") Fact Nos. 1-96.)

2. The second cause of action in the Dennis Complaint for intentional infliction of emotional distress has no merits. (*See* Undisputed Fact Nos. 1-96.)

3. The third cause of action in the Dennis Complaint for negligent infliction of emotional distress has no merit. (*See* Undisputed Fact Nos. 1-96.)

This motion is, and will be, based upon this notice of motion and motion, the memorandum of points and authorities in support thereof, the separate statement of undisputed facts required by California Code of Civil Procedure Section 437c(b), the declarations of Michael Ryan and Mark E. Goldsmith filed concurrently herewith, testimony from the Federal Mine Safety and Health Review Commission hearing, pleadings and records on file in this action, and such other argument or evidence that the Court may permit Defendants to present.

Date: May 16, 1995

NAOMI YOUNG, ESQ.
LAWRENCE J. GARTNER, ESQ.
MARK E. GOLDSMITH, ESQ.
GARTNER & YOUNG
A Professional Corporation

By: /s/ Mark E Goldsmith
MARK E. GOLDSMITH

Attorneys for Defendants
ALL AMERICAN ASPHALT, DANIEL SISEMORE and MICHAEL RYAN

NAOMI YOUNG, ESQ. (63468)
LAWRENCE J. GARTNER, ESQ. (47872)
MARK E. GOLDSMITH, ESQ. (127701)
GARTNER & YOUNG
A Professional Corporation
1925 Century Park East, Suite 2050
Los Angeles, California 90067-2709
Telephone: (310) 556-3576

Attorneys for Defendants
ALL AMERICAN ASPHALT, DANIEL SISEMORE
and MICHAEL RYAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

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| JAMES HYLES, DERRICK SOTO, and DOUGLAS MEARS,<br><br>Plaintiffs,<br><br>vs.<br><br>ALL AMERICAN ASPHALT, a corporation; DANIEL SISEMORE, an individual; MICHAEL RYAN, an individual, and DOES I through XX, inclusive,<br><br>Defendants. | CASE NO. 236 616<br><br>[Assigned For All Purposes to Department 5, The Honorable Dennis C. McCohaghy [sic]]<br><br>MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES OF DEFENDANTS ALL AMERICAN ASPHALT, DANIEL SISEMORE AND MICHAEL RYAN<br><br>Date: June 20 95<br>Time: 8:30 a.m.<br>Dept.: 5<br><br>Trial Date: February 13, 1996<br>Discovery Cut-off: January 12, 1996<br>Motion Cut-off: January 12, 1996<br><br>(Filed May 16, 1995) |

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## I. INTRODUCTION

Having already pursued remedies under their collective bargaining agreement ("CBA") and under the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq.* ("FMSH Act"). Plaintiffs are now also attempting to obtain remedies under California tort law for alleged retaliatory termination arising from two layoffs by Defendant All American Asphalt.[1] Plaintiffs claim they were laid off twice, once in 1992 and once in 1993, allegedly in retaliation for complaining about safety conditions.[2] They filed grievances challenging their first layoff as in violation of the CBA[3] and also filed complaints with the Federal Mine Safety and Health Administration ("MSHA") after both layoffs.

Summary judgment should be awarded in favor of Defendants. First, because Plaintiffs engaged in concerted activity in allegedly raising concerns about safety, any purported retaliation arising from such activity is arguably within the protections of Sections 7 and 8 of the National Labor Relations Act ("NLRA"), and this Court lacks jurisdiction to adjudicate Plaintiffs' causes of action.

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[1] Plaintiffs claim they were terminated in violation of public policy. Plaintiff Dennis alone also claims negligent and intentional infliction of emotional distress.

[2] All American voluntarily reinstated Plaintiffs after both layoffs under threat from the Secretary of Labor of a petition for temporary reinstatement. Under the FMSH Act, miners must be temporarily reinstated upon a mere showing by the Secretary of Labor that their complaints were not frivolously brought.

[3] Grievances were filed, and then withdrawn, challenging the second layoff as well.

Secondly, Plaintiffs' claims are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 ("Section 301"). In order to determine that Plaintiffs' layoffs were improper, as they contend, the CBA's extensive provisions regulating employee layoffs would have to be referred to and interpreted, which can only be accomplished pursuant to Federal labor law as opposed to California tort law.

Plaintiffs' claims are further preempted by the Federal Mine Safety and Health Act, which exclusively regulates matters concerning mine safety.

In addition, aside from considerations of preemption, Plaintiffs' claim of termination in violation of public policy is without merit. An essential element of a claim of retaliatory discharge is that the employer had knowledge that the employee engaged in protected activity. Mears, Soto, and Dennis never made any complaint to MSHA prior to their first layoff, and while Hyles did complain to MSHA, All American did not have knowledge that he had done so until after his layoff. As to the second layoff, the only reason that Plaintiffs were laid off is that they failed and refused to exercise their contractual right to bump junior employees.

Further, Dennis' claims for negligent and intentional infliction of emotional distress are also without merit. His claims are not only also preempted by Section 301, but they are, as well, within the exclusive jurisdiction of the California Workers' Compensation Act. Furthermore, a layoff, even if claimed to be improper, does not, as a matter of law, constitute extreme and outrageous behavior.

Finally, Defendant Ryan should be dismissed pursuant to the managerial privilege.

For these reasons, Defendants submit that their motion for summary judgement should be granted.

## II. ARGUMENT

### A. Regulation of Defendants' Alleged Conduct is Within the Exclusive Jurisdiction of the National Labor Relations Board.

Where state causes of action challenge activities which are *arguably* unfair labor practices under Sections 7 or 8 of the National Labor Relations Act, 29 U.S.C. Sections 157, 158, such causes of action are preempted because they are completely within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). *San Diego Unions v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959); *Intern. Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 393, 106 S. Ct. 1904, 1913 (1986) (" . . . A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court. . . . "). Thus, states may not provide their own regulatory or judicial remedies for conduct arguably prohibited by the NLRA, even if the state remedy is different from or supplemental to that granted to the NLRB. *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286-287, 106 S. Ct. 1057, 1061

(1985).[4] Even if the NLRB declines to act, a state court may still not assert jurisdiction over what is arguably an unfair labor practice. *Rodriquez v. Yellow Cab Co-Op, Inc.*, 206 Cal. App. 3d 668, 674, 253 Cal. Rptr. 779, 781 (1988).

Section 7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection. Section 8 prohibits employer interference with or restraint or coercion of employees in the exercise of their Section 7 rights. The "mutual aid or protection" clause " . . . protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums. . . . " *Eastex v. NLRB*, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 2512 (1978).[5] The NLRB has held that expressions of concern regarding safety are encompassed with the protections of Sections 7 and 8 of the NLRA. *Martin Marietta Corp.*, 293 N.L.R.B. 719, 131 LRRM 1714 (1989). *Accord, Platt v. Jack Cooper Transport Co., Inc.*, 959 F.2d 91, 95 (8th Cir. 1992) (" . . . Platt could have brought to the NLRB the specific claim asserted in this lawsuit – that he was fired for making job safety complaints. . . . ")[6] *See also, Henry v. Intercontinental Radio, Inc.*, 155

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[4] For example, punitive damages, such as those sought by Plaintiffs herein, are inconsistent with the remedial philosophy of the NLRA. *Id.*, 475 U.S. at 288, n.5, 106 S.Ct. at 1062.

[5] " . . . [O]ne recognized area of protected activity under section 7 is employee complaints to government agencies. . . . " *Squier Distributing Co. v. Local 7, Intern. Broth.*, 801 F.2d 238, 241 (6th Cir. 1986).

[6] The NLRB has also held that the conduct of two black employees in filing almost identical discrimination complaints on the same date with a state civil rights commission

Cal. App. 3d 711, 713, 202 Cal. Rptr. 328, 331 (1984) (claim of termination in violation of public policy based in part on employee working to increase wages for black employees was preempted under *Garmon* principles); *Bassett v. Attebery*, 180 Cal. App. 3d 290, 291, 225 Cal. Rptr. 399, 400 (1986) (claim of termination in violation of public policy dismissed because within exclusive jurisdiction of NLRB).

In order for an employee's activity to be "concerted," the activity must be engaged in with or on the authority of other employees as opposed to solely by and on behalf of the employee himself. *Meyers Industries, Inc.* (Meyers I), 268 N.L.R.B. 493, 115 LRRM 1025 (1984); *Meyers Industries, Inc.* (Meyers II), 281 N.L.R.B. 882, 123 LRRM 1137 (1986); *affirmed, Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied, Meyers Industries, Inc. v. N.L.R.B.*, 487 U.S. 1205, 108 S. Ct. 2847 (1988). Concerted activity may be established by an employee's discussion of safety issues with other employees before the employee's alleged retaliatory discharge, *Meyers II*, 281 N.L.R.B. at 885, by an employee's notification to fellow employees that he intends to seek improvements in working conditions, *Meyers II*, 281 N.L.R.B. at 886, n.34, or by an employee refraining from making his own complaint, relying upon another employee to resolve the dispute. *Meyers II*, 281 N.L.R.B. at 886-887.

In *Salisbury Hotel, Inc.*, 283 N.L.R.B. 685, 125 LRRM 1020 (1987), the NLRB held that an employer violated

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constituted protected activity under the NLRA. *Franklin Iron & Metal Corp.*, 315 N.L.R.B. No. 120, 148 LRRM 1246 (1994).

Section 8 of the NLRA when it discharged an employee because, *inter alia*, she had complained to other employees about a change in the employer's lunch hour policy and had thereafter contacted the U.S. Department of Labor regarding the change. Rejecting the employer's argument that the employee's complaints to other employees and her telephone call to the Department of Labor did not constitute concerted activities, the NLRB held that " . . . Resnick's complaints to other employees fit precisely into this category of concerted activity." *Id.*, 283 N.L.R.B. at 686. It further found that the employee's telephone call to the Department of Labor was a continuation of that concerted activity. *See also, Every Woman's Place, Inc.*, 282 N.L.R.B. 413, 124 LRRM 1001 (1986) (telephone call to Department of Labor was sufficiently linked to group activity to constitute protected activity).

In *T & W Fashions, Inc.*, 291 N.L.R.B. 137, 131 LRRM 1293 (1988), the NLRB held that the attendance of employees at a meeting with representatives of the Department of Labor to obtain information in support of a civil action for failure to pay minimum and overtime wages constituted concerted activity protected by Section 7 of the NLRA. *See also, Squier Distributing Co. v. Local 7, Intern. Broth.*, 801 F.2d 238, 242 (6th Cir. 1986) (holding that four employees who gave statements to a sheriff regarding embezzlement of company funds were unlawfully discharged for protected activities.)

The undisputed evidence establishes that any alleged retaliatory layoff of Plaintiffs herein because of safety complaints arose from concerted activity protected under Sections 7 and 8 of the NLRA. Not only was Hyles allegedly concerned for the safety of other employees

when All American's plant was started up, but the alleged safety hazards were a topic of conversation of all the employees, and all of the employees allegedly voiced their concerns. [Fact Nos. 8-9]. Plaintiffs discussed among themselves the plant being started up without all the safety devices in place. [Fact No. 10]. The Plaintiffs told another employee, Gerry Richter, that the plant was allegedly unsafe. [Fact No. 10]. Hyles thereafter complained to his union representative that All American was allegedly starting up its plant without all the required safety equipment installed. [Fact No. 7].

The Plaintiffs also discussed among themselves Hyles' intent to videotape the plant due to the alleged safety conditions [Fact Nos. 11-12], and Hyles told the other Plaintiffs that he was going to take the videotape to MSHA. [Fact No. 13.] Plaintiffs all agreed that All American should be turned in because of the alleged safety violations, and they discussed that Hyles would go file a complaint with MSHA because he was the leadman. [Fact Nos. 13-14].

After their initial layoff, Plaintiffs then discussed among themselves filing discrimination complaints with MSHA challenging their layoff, and all of the Plaintiffs then went to MSHA together to file retaliation complaints. [Fact No. 65.]

B. Plaintiffs' Causes of Action Are Also Preempted By Section 301 Of The Labor Management Relations Act.

Where resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the state claim is preempted by Section 301 of the Labor

Management Relations Act. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 406, 108 S. Ct. 1877, 1881 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904 (1985). Such preemption is mandated even if the state claim involves so-called "nonnegotiable" rights. *Lingle*, 486 U.S. at 407, n.7, 108 S. Ct. at 1882. *Accord, Schlacter-Jones v. General Telephone*, 936 F.2d 435, 442 (9th Cir. 1991) (claim for denial of California Constitutional right to privacy preempted by Section 301). Preemption is mandated in order to prevent differing interpretations of union contract provisions under state and federal law which would " . . . inevitably exert a disruptive influence upon the negotiation and administration of collective bargaining agreements." *Lingle*, 486 U.S. at 404, n.3, 108 S. Ct. at 1880.

In *Allis-Chalmers*, the Supreme Court held that plaintiff's state tort action for bad faith handling of his disability claim was preempted by Section 301 because any finding of liability would necessitate interpretation of a collective bargaining agreement. " . . . The parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner. Similarly, the question whether Allis-Chalmers required Lueck to be examined by an inordinate number of physicians evidently depends in part upon the parties' understanding concerning the medical evidence required to support a benefit claim." *Allis-Chalmers*, 471 U.S. at 218, 105 S. Ct. at 1914.

The instant lawsuit is not a case where any of the Plaintiffs were terminated based upon performance issues or alleged misconduct. Rather, each was laid off by

All American pursuant to a collective bargaining agreement's ("CBA") detailed layoff and recall procedures. [Fact No. 44.] Plaintiffs' claims therefore necessarily rest upon All American's alleged failure to follow the CBA's requirements in laying them (as opposed to others) off and failing to recall them. In either case, as in *Allis-Chalmers,* the agreement of All American and the union representing its employees as to how layoffs would be handled and selection made among employees is necessarily relevant to any allegation that Plaintiffs' layoff was improper. *See Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400, 403 (9th Cir. 1990) *cert. denied*, 498 U.S. 835, 111 S. Ct. 102 (1990) (state claims challenging termination preempted because determination of scope and application of employer's attendance policy dependent upon analysis of collective bargaining agreement).

Each of the Plaintiffs in fact filed grievances under the CBA claiming that their layoffs and All American's failure to recall them was in violation of the CBA.[7] [Fact No. 60]. Plaintiffs discussed that less senior people were allegedly working at the plant after their layoff. [Fact Nos. 62-63.] Plaintiffs' grievances then went to arbitration under the CBA, and in rendering an award finding that Plaintiffs Mears, Soto and Dennis suffered no loss of wages because they were not qualified for any available

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[7] Plaintiffs complained that after their layoff, All American was working less senior people in their positions and that All American was violating the CBA by working people out of classification. Plaintiffs withdrew the grievances challenging their second layoff. [Fact Nos. 60 and 94.]

job, Arbitrator Robert Steinberg interpreted the relevant CBA provisions.[8] [Fact No. 64.]

Plaintiffs also filed complaints with the Federal Mine Safety and Health Administration (MSHA) claiming retaliatory termination for complaining about mine safety. [Fact No. 65]. Plaintiffs' MSHA complaints again put at issue All American's alleged violation of the CBA's layoff and recall provisions. [Fact No. 65.] At a hearing on Plaintiffs' MSHA complaints, the Secretary of Labor made alleged violation of the CBA's layoff procedures a key element of the case.[9] For example, an MSHA investigator had reviewed the CBA's layoff provisions and questioned both union officials and Defendant Ryan as to whether Plaintiffs' layoffs violated the CBA. [Fact No. 71.] MSHA and the Secretary of Labor considered the alleged violation of the CBA's layoff provisions as evidence of purported retaliation. As the Secretary asserted, " . . . it is our claim that there was disparate treatment *because the contract was violated* with respect to this layoff." (Emphasis added.)[10] [Fact No. 66.]

The Secretary of Labor also called union officials at the hearing to testify about their interpretation of the

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[8] At the hearing on Plaintiffs' retaliation claims under the FMSH Act, the Secretary of Labor put the arbitration decision in the record as evidence of alleged discrimination. [Fact No. 66.]

[9] The Secretary of Labor's legal counsel stated that alleged violation of the CBA's layoff provisions was proof that Plaintiffs had been adversely treated because of their alleged safety complaints. [Fact No. 66.]

[10] The Secretary also contended that there was a " . . . practice of manipulating the contract and job classifications in order to terminate employees. . . . " [Fact No. 66.]

CBA's layoff procedures. Put at issue was the meaning of contractual language such as seniority within classification, working out of classification, qualification for bumping into a position,[11] and the ability to retroactively bump another employee. [Fact Nos. 67-70, 91.] Plaintiffs were questioned about their understanding of the meaning of the CBA's provisions. [Fact Nos. 42, 72-73.]

Because Plaintiffs' claims of retaliatory layoff require interpretation of the CBA's provisions regarding such matters as layoff, seniority, job classification and bumping rights, Plaintiffs' claims are preempted by Section 301.

C. Plaintiffs' Claims are Preempted By The Federal Mine Safety And Health Act.

Mine safety is governed by the Federal Mine Safety and Health Act, not California Law. *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1475 (9th Cir. 1984) (upholding dismissal of employee's state law cause of action for termination in violation of public policy arising from alleged safety complaints).[12] *Cf., Snow v. Bechtel Construction Inc.*, 647 F. Supp. 1514, 1517 (C.D. Cal. 1986)

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[11] Collins testified that if an employee disagreed with the employer's determination of qualifications under the CBA, that would be a matter grievable under the CBA. [Fact No. 69.]

[12] Because *Olguin* also discussed preemption under Section 301 and was decided before *Allis-Chalmers, supra*, the Court in *Miller v. AT&T Network Systems*, 850 F.2d 543, 549 (9th Cir. 1988) said that *Olguin* was no longer binding precedent (presumably on 301 preemption issue). However, *Olguin* has consistently been cited as precedent since *Miller*. For example, *see Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 844 (9th Cir. 1989); *Harris, supra*, 897 F.2d at 403.

("whistleblower" provision of the Energy Reorganization Act, 42 U.S.C. § 5851, analogous to the "whistleblower" provision of Mine Safety and Health Act (30 U.S.C. § 815(c)) and plaintiff's action for retaliatory discharge was therefore preempted); *Contra, Echard v. Devine*, 726 F. Supp. 1045, 1047 (N.D.W.Va. 1989); *But see, Stokes v. Bechtel North American Power Corp.*, 614 F. Supp. 732, 742-744 (N.D. Cal. 1985); *Gaballah v. P.G. & E*, 711 F. Supp. 988, 991 (N.D. Cal 1989).

D. Plaintiffs' Layoffs Were Not In Violation Of Public Policy.

Plaintiffs' public policy discharge claim should be dismissed because, based upon undisputed facts, the claims has no merit. In order to establish a claim of retaliatory termination for engaging in a protected activity, the employee must establish that the employer was aware that the employee engaged in the protected activity prior to the termination. *Cuffy v. Texaco Refining & Marketing Co.*, 684 F. Supp. 87, 95 (D. Del. 1988). The facts are undisputed that All American was not aware that Plaintiffs had engaged in any protected activity prior to the first layoff.

First, Mears, Soto and Dennis *never* filed any safety complaint with MSHA. [Fact No. 13-14.] The only basis, for their claim of retaliatory termination is that they were interviewed by an MSHA investigator regarding possible safety violations. It is, however, undisputed that this same investigator interviewed virtually all the employees of All American, the vast majority of whom were not laid off. [Fact No. 27.] Moreover, the evidence is undisputed

that Defendants were completely unaware of anything any of the employees, including Mears, Soto and Dennis said to the MSHA investigator prior to the layoff. [Fact No. 29.] Consequently, there are no facts to establish that Defendants were in any way aware of any alleged protected activities on the part of Mears, Soto and Dennis. [Fact No. 29.]

Although Hyles did file a safety complaint with MSHA, the evidence is uncontroverted that Defendants were not aware that he had done so prior to the first layoff. [Fact No. 20.] Neither Hyles nor anyone else ever told Defendants prior to the first layoff that he had filed a complaint. [Fact No. 19.] In fact, Hyles went to great lengths to keep his filing of the complaint a secret. [Fact No. 19.]

As to Plaintiffs' second layoff, the evidence is undisputed that the only reason Plaintiffs were laid off is that at a meeting held by their union to allow all affected employees, including Plaintiffs, to exercise their contractual bumping rights, each of the Plaintiffs failed and refused to exercise those rights and bump a junior employee. [Fact Nos. 79-86, 89-90.] Defendants cannot have been held to have retaliated against Plaintiffs when it was Plaintiffs themselves who refused to exercise their contractually mandated bumping rights to avoid layoff. [Fact Nos. 79-86, 89-90.]

E. Dennis' Emotional Distress Claims Are Preempted By Both Section 301 Of The Labor Management Relations Act And The California Workers' Compensation Act And Are Factually Insufficient.

Dennis' emotional distress claims are also preempted by Section 301 of the Labor Management Relations Act. *Harris, supra,* 897 F.2d at 403; *Newberry v. Pacific Racing Ass'n.,* 854 F.2d 1142, 1149-1150 (9th Cir. 1988) (emotional distress claim cannot be decided without interpreting or analyzing collective bargaining agreement.)

Further, Dennis' emotional distress claims are barred by the exclusive remedy provisions of the California Workers' Compensation Act, § 3600 *et seq; Cole v. Fair Oaks Fire Protection Dist.,* 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 315 (1987); *Livitsanos v. Superior Court,* 2 Cal. 4th 744, 751-753, 7 Cal. Rptr. 2d 808, 813-814 (1992); *Robomatic, Inc. v. Vetco Offshore,* 225 Cal. App. 3d 270, 275, 275 Cal. Rptr. 70, 73 (1990). As in these cases, the actions challenged by Dennis are simply part of the normal frictions of the employer/employee relationship, whatever label he attempts to put on it.

Moreover, Dennis' claims are factually insufficient as a matter of law. To prevail on his claim, he must show that Defendants' conduct was so extreme and outrageous as to exceed all bounds and conduct usually tolerated in a civilized community. *Davidson v. City of Westminster,* 32 Cal. 3d 197, 209, 185 Cal. Rptr. 252, 259 (1982).

Courts have consistently denied emotional distress claims under facts arguably more egregious than those Dennis alleges herein. *See, Appl v. Lee Swett Livestock*

*Company*, 192 Cal. App. 3d 466, 470-473, 237 Cal. Rptr. 433-438 (1987) (no outrageous conduct where employer terminated plaintiff, evicted him from his living quarters, and failed to provide him with needed medical attention); *Schneider v. TRW, Inc.*, 938 F.2d 986, 992 (9th Cir. 1991) (no outrageous conduct where supervisor screamed at employee while criticizing employee's performance and making threatening gestures); *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1129, 257 Cal. Rptr. 665, 671-672 (1989) (no outrageous conduct where supervisor allegedly made insulting remarks about plaintiff's age and senility).

F. Defendant Ryan Should Be Dismissed Because of the Managerial Privilege.

It is undisputed that Ryan is a Vice President of All American and that he has never been Plaintiffs' employer. [Fact No. 2.] Pursuant to the managerial privilege in which he was acting on behalf of his employer, All American, Ryan cannot be held individually liable for Plaintiffs' claims. *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880, 883 (1964) (vice president and general manager as well as members of the board of directors could not be held liable for inducing breach of employment contract "for their action was that of the corporation itself."); *Becket v. Welton Becket & Associates*, 39 Cal. App. 3d 815, 822-823, 114 Cal. Rptr. 531, 535 (1974) (president and chief executive officer was held immune from liability for threatening to discharge the plaintiff.) Therefore, in addition to all the arguments applicable to all Defendants, the claims against Ryan should also be dismissed pursuant to the managerial privilege.

## III. CONCLUSION

Plaintiffs' alleged retaliatory termination claims are preempted by Sections 7 and 8 of the NLRB, Section 301 of the Labor Management Relations Act, the Federal Mine Safety and Health Act and Dennis' emotional distress claims are preempted by Section 301 and the California Workers' Compensation Act. Further, even if there was no preemption, the undisputed facts are that Plaintiffs' claims have no merit. Finally, Ryan should be dismissed pursuant to the managerial privilege. For the foregoing reasons, Defendants' motion for summary judgment should be granted in its entirety.

Date: May 16, 1995

NAOMI YOUNG, ESQ.
LAWRENCE J. GARTNER, ESQ.
MARK E. GOLDSMITH, ESQ.
GARTNER & YOUNG
A Professional Corporation

By: /s/ Lawrence J. Gartner
LAWRENCE J.
GARTNER

Attorneys for Defendants
ALL AMERICAN ASPHALT,
DANIEL SISEMORE
and MICHAEL RYAN

UNITED STATES CODE ANNOTATED

TITLE 29

LABOR

CHAPTER 7 – LABOR MANAGEMENT RELATIONS

SUBCHAPTER II – NATIONAL LABOR RELATIONS

**§ 157. Right of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

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**§ 158. Unfair labor practices**

**(a) Unfair labor practices for an employer**

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the

employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**(b) Unfair labor practices by labor organization**

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to

make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

*Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any

person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any

other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

**(c) Expression of views without threat of reprisal or force or promise of benefit**

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

**(d) Obligation to bargain collectively**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to

the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any

employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety-days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

**(e) Enforceability of contract or agreement to boycott any other employer; exception**

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting or work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

**(f) Agreement covering employees in the building and construction industry**

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a

bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

**(g) Notification of intention to strike or picket at any health care institution**

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.